

IN THE MISSOURI SUPREME COURT

SUPREME COURT NO. SC94212
22nd CIRCUIT NO. 1322-CC10008

CITY OF ST. LOUIS, *et al.*, APPELLANTS

v.

SARAH K. TUPPER AND SANDRA L. THURMOND, RESPONDENTS

Appeal from the Circuit Court of the City of St. Louis
22nd Judicial Circuit, Division 7
Circuit Judge The Honorable Steven R. Ohmer

CROSS APPEAL REPLY BRIEF OF RESPONDENTS / CROSS-APPELLANTS
SARAH K. TUPPER AND SANDRA L. THURMOND

Respectfully submitted,

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RESPONDENTS' CROSS APPEAL REPLY ARGUMENT

The City, at pp. 41-44 of its Brief, in the section responding to Tupper and Thurmond's Cross-Appeal of the Trial Court's denial of their Motion for Attorney's Fees, focuses on the City's various amendments to its Notice of Violation for red light camera tickets. Tupper and Thurmond acknowledge that in light of *Smith v. City of St. Louis*, 409 S.W.3d 404, 418 (Mo. App. E.D. June 11, 2013) that the City did amend its Notice of Violation several times. But the point of Tupper and Thurmond's motion for attorney's fees has nothing to do with the Notice of Violation. Indeed, at the beginning of trial Tupper and Thurmond made a record that they believed the Notice then in use was compliant with the rules and the law, Tr. 7.

The point of Tupper and Thurmond's application for attorney's fees as an element of damages is that Tupper and Thurmond were forced to file this collateral equitable litigation on November 25, 2013 because the City was continuing its red light camera ticket program even though three appellate decisions had rejected such programs in a broad variety of factual situations and on a broad variety of grounds. Tupper and Thurmond are further seeking attorney's fees because of the City's intentional misconduct throughout its prosecution of the underlying tickets that formed the basis for their collateral equitable suit.

The relevant Court of Appeals decisions are:

1. *Unverferth .v City of Florissant*, 419 S.W.3d 76 (Mo. App. E.D. September 10, 2013),

2. *Ballard v. City of Creve Coeur*, 419 S.W.3d 109 (Mo App. E.D. October 1, 2013), and
3. *Edwards v. City of Ellisville*, 426 S.W.3d 644, 664 (Mo. App. E.D. November 5, 2013).

Even though it is true that when Tupper and Thurmond filed their case those decisions were not final, nevertheless in the later decisions the Court of Appeals quoted liberally from its earlier decisions, so it seems that the Court of Appeals in *Edwards* for example, considered *Unverferth* and *Ballard* to be good enough law to be cited and relied on. The City of St. Louis's opposite view required Tupper and Thurmond to file this case.

The need to become involved in collateral litigation to stop enforcement of an unlawful ordinance – because the prosecutions were multiple and on-going - triggers attorney's fees under the case law stated in Tupper and Thurmond's cross appeal. See the cases quoted in Tupper and Thurmond's earlier brief: *Motor Control Specialties, Inc. v. Labor & Indus. Relations Comm'n*, 323 S.W.3d 843, 854, 855 (Mo. Ct. App. 2010), *Lett v. City of St. Louis*, 24 S.W.3d 157, 162 (Mo.App. E.D.2000) and *Essex Contracting, Inc. v. Jefferson Cnty.*, 277 S.W.3d 647, 657 (Mo. Banc 2009).

The City attempts to distinguish its program from those rejected by the Court of Appeals decisions because the City's Ordinance was silent as to points and because the City's program had been construed as civil even as subsequent Court of Appeals decisions found other city's programs to be criminal. Tupper and Thurmond suggest that such distinctions are without differences. By the time Tupper and Thurmond filed this

case the Court of Appeals had made increasingly strong holdings in a variety of circumstances that red light camera ticket programs violated the Constitution and Missouri law. (As noted by the City, the day after Tupper and Thurmond filed their case the Western District issued yet another decision condemning red light camera tickets, *Damon v. City of Kansas City*, 419 S.W.3d 162 (Mo. App. W.D. November 26, 2013). The City greeted this case with continued defiance).

Tupper and Thurmond will conclude this Reply by pointing to a dog which has not barked. The court in *Klinkerfuss v. Cronin*, 289 S.W.3d 607, 618 (Mo.App. E.D.2009) noted that attorney's fees may be awarded when a party engages in intentional misconduct. Tupper and Thurmond discussed in their Brief the City's dismissals of Tupper 2 and Thurmond 1 and 2 from the City's municipal court in an attempt to moot this matter when Judge Ohmer was "poised" to enter his order, all leading to an endless round of briefing on the mootness doctrine, and sending a message to the public that the City was not willing to defend its program or its enforcement practices even though it was taking millions of dollars a year out of the citizen's pockets. The City's Brief is wholly silent as to its own conduct related to those dismissals.

Tupper and Thurmond assert that the City's conduct regarding those dismissals is the sort of intentional misconduct contemplated by the case law which justifies attorney's fees. Tupper and Thurmond emphasize that this misconduct was not engaged in by a routinely squabbling private party - it was engaged in by a government entity, the City of St. Louis, to avoid litigation on the merits, moot Tupper and Thurmond's prayer for

equitable relief, and, most importantly, to continue operating its red light camera program and collecting fines while avoiding a good faith judicial review.

This court therefore should award attorney's fees to Tupper and Thurmond.

CONCLUSION

Respondents pray the court to reverse the trial court denial of attorney's fees in favor of Tupper and Thurmond and against the City of St. Louis, to award Tupper and Thurmond attorney's fees on appeal, and to remand for determination of a reasonable attorney fee in the trial court, to award costs to Tupper and Thurmond, and for such other relief as the court finds to be just, meet and reasonable.

RULE 84.06(c) CERTIFICATION

This Brief complies with the limitations contained in Rule 84.06(b) because the Brief's word count is less than 7750, that is, the word count is 914.

The Brief has been scanned and is virus free.

/s/ W. Bevis Schock.
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CERTIFICATE OF SERVICE

Undersigned counsel for Intervenors hereby certifies that on November 14, 2014
he delivered copies of this brief by the electronic filing system to:

All counsel of record

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